

TJAGs' Comments on Removing Disposition Authority from Commanders

I. Objections Based on Good Order and Discipline

A. Lieutenant General Richard C. Harding, U.S. Air Force, and Lieutenant General Flora D. Darpino, U.S. Army:

[Question from Professor Hillman]: [] I wonder, preserving this particular role of the commander in making that criminal decision, that decision about criminal prosecution, how can that be so central when we've had such a change in the way the force is constructed and the way discipline is pursued and service members are recruited and retained since that World War II era when this system came into being?

[Response from Lt. Gen. Harding]: . . . It's hard to describe in this room the atmosphere that exists on a military installation and in any military command, whether they're in garrison or deployed. It is hard to explain in this room, in this vacuum, the power behind a commander's message. It is difficult to explain in this vacuum that soldiers, sailors, airmen, and marines all feel this innate desire to fulfill the commander's wishes, that sense of discipline starts with the commander saying, here are my standards, which, in fact, may be standards that are per my criminal code, like the UCMJ. I expect that you will adhere to those standards.

The popular press oftentimes makes fun of the – or kids about the term "zero tolerance." But commanders use that. I have zero tolerance for sexual harassment, zero tolerance for racial discrimination, now zero tolerance for sexual assault. Those are words. When the words are backed up by the commander's action – when a commander takes action in a case, and that is known in that unit like a hot knife through butter, it sends a reinforcing message that says that the commander's words were, in fact, his intent. And that airman is going to be held accountable.

It reinforces through the other 99 percent of the population the fact that the standards that they adhere to themselves were the right standards, and that the commander's words weren't empty, weren't meaningless. And that perception of accountability, that optic owned by the commander is huge powerful medicine in formulating any force, whether it's a force today in 2013, one after World War II, or one that Washington had in 1775. And it works. It works time and again. And that's the piece that you're not going to find a lot of huge science on, and you're not going to be able to determine or see it in the abstract divorced from its environment. But it's important to how we win and fight America's wars. That didn't happen by accident. It was pure military science, and that's part of the military science.

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[Response from Lt. Gen. Darpino]: You are correct that we have an all-volunteer Army right now. It is more educated. We are definitely more disciplined. But the constant that has existed through this whole time is that we are members of the profession of arms. We are in the killing and dying business, and we know that when we take the oath, and I'm not trying to be melodramatic here. But that makes us very, very different, but it's also been the constant. And that's why we have a different system.

Soldiers, from the moment they enter the military, we teach them discipline through command authority, and we build upon that, and that shapes them and makes them part of our force. [It] means that soldiers will follow orders of their commander at their own death. They will be in the killing and dying business because we have disciplined them to follow commander's orders. So when they're at the bottom of a hill and there's overwhelming fire above, when the commander says, "take the hill," they do it because they have been trained through our system to follow the commander's orders.

And they will take that hill, and they will die, not because the lawyer is standing at the bottom back in the bush waiting to court martial them because they don't take the hill. They take it because the commander has told them to, and that exists now in our Army. It existed in the Korean [War], Vietnam. You give me a conflict, it is that discipline that makes the difference.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 290-96 (Sept. 25, 2013).

- B. Vice Admiral Nanette M. DeRenzi, U.S. Navy:** Commanders are responsible and accountable for the safety, health and welfare of their people; commanders must have authority commensurate with this responsibility, and that includes the authority to maintain good order and discipline. As the Chief of Naval Operations noted in his testimony before the Senate Armed Service Committee, "Preventing and responding to sexual assault is not just a legal issue – it is a leadership issue. The performance, safety and climate of a unit begin and end with the commander." Removing disciplinary authority denies commanders a vital enforcement tool to ensure a safe workplace, to maintain a healthy command climate promoting dignity and respect for all, and to field a force ready to execute the mission successfully – at sea and ashore, in peace and in war. *Written Testimony to RSP Public Meeting at 12 (Sept. 25, 2013).*
- C. Rear Admiral Frederick J. Kenney, U.S. Coast Guard:** Military justice, unlike the civilian criminal system, has a dual role of seeking justice and enforcing discipline. This reflects the notion that commanders are in charge of their units, not lawyers or other officials. Any changes to the military justice system should not needlessly undermine commanders' ability to lead and maintain discipline.

Inherent in the concept of military discipline is an accepted senior-subordinate relationship. If that is diminished because the commander cannot hold accountable those in his unit who commit the most serious offenses, the discipline of the military structure will erode. As a former commanding officer of a Coast Guard field operational unit, I observed firsthand the effect on discipline when I was able to act under the Uniform Code of Military Justice to hold individuals accountable. The authority is vital for effective leadership.

Written Testimony to RSP Public Meeting at 6 (Sept. 25, 2013).

- D. Major General Vaughn Ary, U.S. Marine Corps:** This concept of commanders holding criminals accountable is critical to an effective military unit, which is why commanders must be at the center of the military justice system. Commanders bring unique perspective to military justice because they are responsible for their units' good order and discipline, for taking care of their Marines, and for building a culture of dignity,

honor, and mutual trust. They bring that perspective to bear on the decisions they make within the military justice system. When their commanders have convening authority, Marines know that they can and will be held accountable for failing to act like a responsible and honorable Marine. Removing such authority undermines the ability of commanders to enforce the standards they set. *Written Testimony to RSP Public Meeting at 7 (Sept. 25, 2013).*

- E. Lt Gen Harding:** Outsourcing enforcement of standards to far away lawyers diminishes the authority of commanders and cannot, despite its very best efforts, achieve optimal military discipline. Curiously, some have advocated removing commanders as the criminal disposition authorities under the UCMJ, sending a confusing message to our rank and file that you can trust your commander to send you into battle where his or her decisions may cause you to pay the ultimate price, the sacrifice of your life on the altar of freedom, but you cannot trust your commander to hold your fellow airmen accountable for his crime against you. This message is more than just confusing and counterintuitive. It degrades airmen's trust and confidence in their commanders and, in turn, degrades military discipline. *Transcript of Testimony, RSP Public Meeting at 236 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 2 (unnumbered) (Sept. 25, 2013).*
- F. LTG Darpino:** [B]ased on my personal and professional interactions over the past decades with judge advocates from other countries, I do not personally believe that the modification of command authority has been without cost. . . . [Allied] commanders express concern that the degradation of their justice systems leads to undisciplined troops, and then those same commanders are held accountable for the substandard performance of their own soldiers, or, phrased another way, the commander is accountable for a problem that he cannot fix. *Transcript of Testimony, RSP Public Meeting at 222-23 (Sept. 25, 2013).*
- G. Brigadier General Richard C. Gross, Legal Counsel, Chairman, Joint Chiefs of Staff:** The military is a unique environment. We ask Service members to have ultimate faith that their commanding officers will only risk their lives under the most necessary of circumstances. And, when operational requirements necessitate risk to their troops, that commanders have structured, trained, equipped, and disciplined their units in such a way as to minimize that risk to the greatest extent possible. To our military, the question of military discipline is fundamentally intertwined with the greater question of the commander's responsibility for operational readiness. *Transcript of Testimony, RSP Public Meeting at 205-06 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 3 (Sept. 25, 2013).*
- H. LTG Darpino:** Soldier discipline is built and reinforced over a soldier's career by commanders with authority, the authority to address all behavior quickly, visibly, and locally. From my unique perspective, I am convinced that command authority, particularly in the context of military justice, is the most crucial element to ensure the integrity and readiness of our force. *Transcript of Testimony, RSP Public Meeting at 211-12 (Sept. 25, 2013).*
- I. RADM Kenney, USCG:** . . . I've stood in front of my men and women and said, this is the way we're going to do things and I will hold you accountable if you don't. I can't imagine standing in front of them and saying, this is the way we're going to do things, and after I check with my lawyer, I might be able to hold you accountable. I think the

system would begin to fall apart, and that – the necessity for the unity of command would almost immediately erode. *Transcript of Testimony, RSP Public Meeting at 279 (Sept. 25, 2013).*

- J. Lt Gen Harding:** A commander's responsibility under the UCMJ is not an additional duty, but instead, it is woven into the DNA of command, an indispensable element of his authority and a critical tool to achieve his mission. If a Commander cannot be trusted to discipline troops and do so in a firm and fair way, he or she cannot be trusted to lead troops into combat. It is crucial for our Airmen to have no doubts about who will hold them accountable for mission performance and adherence to standards, 24/7, on and off duty. *Written Testimony to RSP Public Meeting at 2 (Sept. 25, 2013).*
- K. Lt Gen Harding:** [T]he importance of the commander role in maintaining good order and discipline of his or her Airmen is critical to maintaining mission capability and combat effectiveness. A judge advocate outside the chain of command would not have the same impact. Creating a separate, external function for prosecutions risks negative consequences arising from constraining commanders' authority to hold Airmen accountable. *Written Testimony to RSP Public Meeting at 5-6 (Sept. 25, 2013).*

II. Objections Based on Logistics

- A. MajGen Ary:** Creating two parallel systems of military justice, each run by a completely different authority will create an inefficient system that will stress existing resources. Despite the proposal's attempt to create two classes of cases, practically, many courts-martial involve offenses from both categories. With two different jurisdictional authorities for these separate groups of offenses, there is a strong possibility for a duplication of effort in case research and preparation. Additionally, the Felony [Initial Disposition Authority] itself is a billet that does not exist in the Marine Corps. If we were required to implement this specific proposal, the Marine Corps estimates that we will require nine extra colonel judge advocates, to act as Felony IDAs, along with forty additional legal billets. *Written Testimony to RSP Public Meeting at 12 (Sept. 25, 2013).*
- B. BG Gross:** [R]emoving the commander from the military justice system will not help us address the concerns that victims have voiced about the process. In every Service, we have heard that victims are concerned about the length of the process, their inclusion and ability to voice preferences within the process, and the opacity of the system. Taking military justice decision-making authority away from commanders will exacerbate all of these problems. *Transcript of Testimony, RSP Public Meeting at 206 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 3-4 (Sept. 25, 2013).*
- C. LTG Flora D. Darpino:** [] I have been personally told, as have other judge advocates, that [Allied] commanders and other forces sometimes hesitate to engage the opposing force in combat operations based on their concerns that their actions will be viewed in hindsight by individuals who [do] not understand combat. There is actually a term of art used to describe this hesitation. It is called "judicial insecurity." My fellow judge advocates from other countries use the term "judicial insecurity" to describe the reluctance of commanders to engage in aggressive operations, cognizant that their actions will be reviewed, investigated, and prosecuted by someone without an understanding of the military, someone who applies common law concepts instead of the

lens of armed conflict. *Transcript of Testimony, RSP Public Meeting at 222-23 (Sept. 25, 2013).*

- D. **RADM Kenney:** One of my really significant concerns . . . is that if we make a sea change to the UCMJ, that will inevitably require re-training, re-familiarization, not just by the core of attorneys within our services, but by the commanders themselves. And that is going to create confusion and delay. And I really fear that some cases that are valid, good cases will get lost in that shuffle, and where is the justice for those people that are in that ramp up period? *Transcript of Testimony, RSP Public Meeting at 313-14 (Sept. 25, 2013).*
- E. **BG Gross:** [T]he move by our Allies to more civilianized systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of their military justice systems to be located [far] from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world. *Transcript of Testimony, RSP Public Meeting at 209 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 5 (Sept. 25, 2013).*
- F. **LTG Darpino:** We need a system that is portable where discipline can be done locally and visibly, and that requires the commander being part of that system. Additionally, based on my personal and professional interactions over the past decades with judge advocates from other countries, I do not personally believe that the modification of command authority has been without cost. From a practical standpoint, . . . our Allies report that it does take longer. It takes longer. Delays in justice never serve the victim, the accused, nor good order and discipline. *Transcript of Testimony, RSP Public Meeting at 222 (Sept. 25, 2013).*

III. Reactions to Proposed Change's Goals of Enhanced Objectivity and Expertise

A. Objectivity and Expertise of Commanders

1. LTG Darpino:

[Question from VADM (Ret.) Houck]: General Darpino, do you believe that taking the commander out of the decision making disposition loop would improve the decisions about what cases should go to courts martial or should be done in terms of disposition of these cases?

[Response from LTG Darpino]: I think that the premise of that belief is based upon a misperception, which says that commanders while not lawyers are also not aware of the judicial process and come new to this at some point in their career where they suddenly have these weighty decisions upon their shoulders.

From the time you are commissioned as an officer, you're given responsibility, and I'm going to use the Army model because I'm an Army officer. As a second lieutenant, you are given responsibility for 20 people. You have had training before you took the oath through your commissioning source, be it West Point where we have an entire department, the Department of Law, that trains

officer[s] on the legal aspects of what we do, or you learned it in . . . your commissioning source through ROTC or otherwise.

You then take control of these 30 individuals as a second lieutenant. From the moment you are responsible for them, you enter into a quasi-judicial role. If they do not show up for formation, you make decisions regarding what type of actions you're going to take, because unlike a workplace where if you don't show up [to] work, you don't get paid[,] [i]f you come late to a formation in the Army or any of our services, . . . that lieutenant [in] a quasi-judicial role can make you come 10 minutes earlier the next day, and 10 minutes earlier the day after that. And if he decides we are not making progress, he then refers it to the first commander, that company commander. And acting in his quasi-judicial role as he has been trained from the time that he's been those eight years now that he's a commander, he now has the ability to take more action. And his action can be that he's going to give you what we call in the Army non-judicial punishment. . . . He can take away your rank, he can take away your pay, all actions at that point because of the liberty interest. He has the advice of an attorney typically. But those are quasi-judicial actions.

You walk that up to a battalion commander, who has 18 to 20 years, lieutenant colonel. He's responsible for . . . about 600 individuals. That individual now has the ability to start a summary court martial where he can put you in jail for 30 days taking away rank, another quasi-judicial role.

You go to the brigade commander. The brigade commander, now he is able to actually refer to a special courts martial with the advice of an attorney. So by the time you get to someone who's going to handle these cases at a general court martial level, they have had 25 years of experience in a quasi-judicial role, either reviewing misconduct and referring it to the commander who has the authority, or tried to take corrective actions on his own with the powers that he or she has.

Transcript of Testimony, RSP Public Meeting at 267-71 (Sept. 25, 2013).

2. **Lt Gen Harding:** There is no evidence to support the notion that removing commanders from the Uniform Code of Military Justice process and replacing them with anyone outside the chain of command will improve the system. In fact, the evidence shows that Air Force commanders and their SJAs agreed on the appropriate disposition in over 99% of cases where the SJA recommended trial by court-martial. Specifically, from 1 January 2010 through 23 April 2013, a little over three years, Air Force commanders declined to prosecute charges which the SJA had recommended for trial in only 22 of 2,511 criminal cases. That equals less than one percent of the time.

Further, the SJA, who advises the commander to prefer a court-martial, has the authority to go to a superior commander in the chain of command seeking preferal if the immediate commander refused to prefer the charge. . . . [I]n 10 of those 22 cases that I just cited, a superior commander determined it appropriate to prefer charges. Therefore, removing commanders from the commander SJA disposition team will make a difference in less than one percent of sexual assaults. Members of the Panel, we need to find a 99 percent solution rather than a one percent solution to combat the crime of sexual assault.

Transcript of Testimony, RSP Public Meeting at 239-40 (Sept. 25, 2013); accord Written Testimony to RSP Public Meeting at 3 (unnumbered) (Sept. 25, 2013).

3. **RADM Kenney:** I worry about risk [averse] attorneys, frankly. I worry about attorneys believing that their win record is supremely important. There are cases that we go forward . . . that it's not as important whether or not we win as it is important that we went forward. And worry about a win-loss record is just not appropriate. Now, that's not all attorneys, but regardless of whether you're in uniform or not, there is that instinct that says, I don't like to lose, if you're a prosecutor. I worry about that.

Right now, the countervailing influence is that commander who says it's okay to get an acquittal. There are worse things than acquittal. A case prosecuted poorly is a worse result, and a case that should've been prosecuted that never was prosecuted is a worse result.

Transcript of Testimony, RSP Public Meeting at 281 (Sept. 25, 2013).

4. **BG Gross:** During his reconfirmation hearing before the Senate Armed Services Committee and in subsequent correspondence, the Vice Chairman of the Joint Chiefs of Staff provided senators with information regarding roughly 100 cases over the past few years in which, after civilian prosecutors declined to go forward on a sexual assault prosecution, the military took action. Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk-averse. Commanders zealously seek accountability when they hear there is a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline, and we need to maintain their ability to do so. The number of prosecutions in these types of cases may very well decline if the very commanders who have a vested interest in accountability are stripped of their power to deal with allegations regarding personnel in their units, in favor of independent military prosecutors. *Transcript of Testimony, RSP Public Meeting at 206-07 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 4 (Sept. 25, 2013).*

B. Structural checks on commander bias currently in place

1. **LTG Darpino:**

[Question from VADM (ret.) Houck]: [S]uppose [a commander] doesn't like women in the armed forces . . . or does not like gays or lesbians in the armed forces. What do we do about that?

[Response from LTG Darpino]: Well, that's where . . . I who advise that commander throughout the process and all of those that work for us as the judge advocate generals within, we then have under Article 6 of the UCMJ, the authority – the unvarnished authority, unchecked authority – to take that up the level through the judge advocate chains, and make sure that justice is done. It is an independent authority that exists by statute that while we work for the commander, we are also independent of the commander when it comes to our legal advice, because our client is the Army, not the commander. And so, that is one check on the system.

We also have other checks on the system. In the Army, we have . . . command climate surveys. Those will now be done within 120 days of arrival in a unit. They will then be done annually thereafter. They will be sent to the higher level commander. . . .

We also have inspectors general that folks can pick up the phone and call. We also have whistleblowers at DoD hotlines. . . . So it is not unchecked power. There are checks and balances in our system, and they do work.

Transcript of Testimony, RSP Public Meeting at 271-72 (Sept. 25, 2013).

2. **MajGen Ary:** The requirement that [the Navy Criminal Investigative Service] investigate all unrestricted reports of sexual assault ensures commanders receive a professional and independent collection of the facts of every sexual assault allegation. The law enforcement investigation and commander's disposition decision are documented for complete transparency. This means that commanders cannot "sweep an allegation under the rug." *Written Testimony to RSP Public Meeting at 8 (Sept. 25, 2013).*
3. **MajGen Ary:** In the Marine Corps model for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely separated from the provision of command legal advice. Practically, this means the commander's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the commander and his SJA receive impartial and independent advice from two different sources outside of the commander's control – law enforcement (NCIS) and Marine prosecutors – in order to make an appropriate and well-informed disposition decision. *Written Testimony to RSP Public Meeting at 9 (Sept. 25, 2013).*

C. Fears of retaliation as a reason for underreporting

1. **LTG Darpino:** [T]he Department of Defense 2012 Workplace and Gender Relations Survey[] supports the conclusion victims' failure to report does not have to do with concerns of retaliation. The overwhelming reason victims (70%) do not report is because they ". . . do not want anyone to know." Interestingly, the next two reasons also deal with privacy concerns, not retaliation. When the survey digs deeper, the vast majority of victims (70%) actually state they "would feel free to report sexual assault without fear of reprisal to a large extent." In other words, privacy is the overriding concern – not fears of retaliation. *Written Testimony to RSP Public Meeting at 11 (Sept. 25, 2013); accord Transcript of Testimony, RSP Public Meeting at 298 (Sept. 25, 2013).*

2. **VADM DeRenzi:**

[Question from VADM (Ret.) Houck]: Admiral DeRenzi, . . . do you believe that removing the commander from the disposition decision making process, the referral process, that taking the commander out of that loop would decrease retaliation against sexual assault survivors? So to put it another way, if we take the commander out, would retaliation go down?

[Response from VADM DeRenzi]: No, I don't think so. I don't think one thing has anything to do with the other. As you delve deeper into the retaliation concern, the retaliation that's expressed isn't necessarily and, frankly, isn't in the vast majority of instances, by the commanders themselves. It's by other individuals, typically the peer group of the victim.

If you take the commander's referral authority away or preferential authority away, you take away their ability to actually discipline the people who may be retaliating against victims. I personally don't see a connection between taking a commander out of a sexual assault preferential decision and reducing the retaliation aspect for a victim who came forward. That also presumes that both the victim and the accused are in the same command, and that's not always the case. I do not understand the logic and the connection there, I just don't.

Transcript of Testimony, RSP Public Meeting at 265-67 (Sept. 25, 2013); accord Written Testimony to RSP Public Meeting at 4 (Sept. 25, 2013) ("Data suggest that victims choose not to report crimes of sexual assault for many reasons. Some may feel shame or embarrassment; others may feel that the accountability process will cause even greater trauma. Still others are concerned with retaliation; however, the retaliation they fear is typically from perpetrators and peers, not commanders.").

3. **Lt Gen Harding:** Proponents of removing commanders as UCMJ disposition authorities believe that relieving commanders of this duty will remove an impediment to victims reporting sexual assault. There is simply insufficient evidence to support this opinion. Our surveys reveal that there are many reasons why victims do not report sexual assaults; however, these surveys do not show that victims' distrust of their commander is one of the principle [sic] reasons they do not report sexual assaults. The surveys show that fear of retaliation and of being ostracized is a reason some victims do not report their sexual assaults. However, the surveys do not make clear what the source of that fear is . . . – whether, for example, they fear co-workers, or supervisors, or commanders. *Written Testimony to RSP Public Meeting at 3 (unnumbered) (Sept. 25, 2013)*.
4. **LTG Darpino:** [R]etaliation is of great concern to us because commanders are charged with the welfare of their troops, the safety, the morale And they take that very seriously. And so, the fact that there may be a perception that they are the ones that retaliate is of great concern, which is why we all have elevated [the disposition authority for sexual assault cases] up to a more senior commander.

When three-fourths of these crimes occur between an E-1 and an E-4, most of them aren't absolutely sure who that old guy is with the birds on his shoulder. I mean, they may never have seen him. It's really their company level commander.

Transcript of Testimony, RSP Public Meeting at 297-98 (Sept. 25, 2013).

IV. Evidence Relevant to Proposed Change

A. Recent progress under status quo

1. **LTG Darpino:** For reporting, command emphasis has generated a steady rise in the “propensity to report” calculated by the Army Research Institute Gender and [sic] Relations Survey. This Army survey, administered in 2012 to a larger population using an accepted gender survey, concludes that female Soldiers reported penetrative sexual assaults (rape, sexual assault, forcible sodomy and attempts to commit) at a rate of 54% and contact offenses (abusive sexual contact, aggravated sexual contact) at a rate of 42%. Due to our sustained efforts, this represents a dramatic increase from the 2009 survey propensity to report of 28%. The survey data is corroborated by a corresponding increase in the raw number of reports. Fiscal Year 2013 data indicates that all the Services, including the Army, will see unprecedented rises in reporting by over 40% from the 2012 rates. I believe this encouraging data reflects increased trust from victims in the chain of command and traction for our efforts. *Written Testimony to RSP Public Meeting at 10 (Sept. 25, 2013).*
2. **MajGen Ary:** The [C]ommandant’s campaign plan is working. While it is always difficult to interpret statistics relating to an issue as complex [as] sexual assault, the Marine Corps has seen a 71% increase in sexual assault reporting (restricted and unrestricted) over the previous year. We believe that this increased reporting reflects an increased trust in the Marine Corps and its ability to care for victims.

Approximately ten percent of those reports relate to alleged crimes committed before the marine entered active duty. An additional 15 percent of those reports relate to alleged crimes committed over one year ago. These latent reports demonstrate that the marines of today are more willing to report allegations of sexual assault than they were just one year ago. This reflects increased trust that a commander-led system of military justice will treat them with dignity and respect and hold offenders accountable.

Transcript of Testimony, RSP Public Meeting at 245-46 (Sept. 25, 2013); accord Written Testimony to RSP Public Meeting at 4 (Sept. 25, 2013).

3. **VADM DeRenzi:** In FY11, the Navy had 550 reports of sexual assault, of which the vast majority – 408 – were unrestricted. In FY12, the Navy received 726 reports, of which 527 were unrestricted, representing a 32% increase in total reports. We expect to see a marked increase in FY13. *Written Testimony to RSP Public Meeting at 5 (Sept. 25, 2013).*
4. **Lt Gen Harding:** There is no evidence that victims mistrust their wing commanders to handle sexual assault charges. In fact, our prosecution rate for sexual assault in the last year following the Secretary’s elevation of disposition authority to wing commanders demonstrates that victims have much reason to trust wing commanders. In the last year, following the Secretary of Defense’s order elevating UCMJ disposition authority over sexual assault cases, the Air Force’s overall prosecution rate for sexual assault cases has risen by 300 percent. This is a clear indication to victims that wing commanders do not sweep sexual assault cases under the rug or have reason to believe they might. *Transcript of Testimony, RSP Public Meeting at 239 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 3 (Sept. 25, 2013).*

5. **MajGen Ary:** If revolutionary change is proposed, we must be sure evolutionary change is not working. Right now, evolutionary change is just beginning to show signs of success.

Looking back at the last three years, it is worth noting that our system of military justice is in the middle of executing a remarkable amount of change. Included in this change was a complete revision of the substantive law defining sexual assault. The 2012 statute adopted an “offender-centric” scheme that focuses on offenders’ actions, and not the behavior of the victim, to determine culpability. We are just beginning to acquire measures of effectiveness for the new statute. Looking at the current proposed legislation from the Senate and the House, it is very likely that the FY14 NDAA will contain or require approximately thirty changes related to sexual assault and military justice. Combined with the changes of the last three years, this is a staggering amount of evolutionary change for one particular class of offenses. We should embrace these changes if they improve our ability to prosecute and defend cases, and protect victims. We must also fully assess the effects of these changes before implementing more revolutionary and fundamental changes to the military justice system. Replacing a commander-driven system of justice with a lawyer-driven model is revolutionary, not evolutionary, and will do more harm than good.

Written Testimony to RSP Public Meeting at 11-12 (Sept. 25, 2013); accord Transcript of Testimony, RSP Public Meeting at 250-51 (Sept. 25, 2013)

(“[C]ontinuous evolutionary change in military justice is healthy and necessary. Revolutionary change, on the other hand, should only be made when the system is at a point of failure. I do not believe that military justice is anywhere near such a point. On the contrary, I think many aspects of our military justice system are working very well and are significantly assisting us in our fight against sexual assault.”).

6. **VADM DeRenzi:** . . . I’ve heard others . . . say [] that if you take the commander out of the decision, there’s a possibility of increased reporting. That may be true for some individuals, but when you listen to what you’ve heard today in terms of the importance of discipline in our business, changing the system, frankly, standing it on its head to get at the possibility is something that we should think very, very carefully about before we go forth and do it, particularly when we’ve improved a lot of the victim support processes, reporting processes. I believe the Navy will also see a marked increase in reporting over the course of the last Fiscal Year. *Transcript of Testimony, RSP Public Meeting at 299-300 (Sept. 25, 2013).*

B. Comparisons to civilian and Allied military systems

1. **BG Gross:** [N]one of the allies I surveyed could draw a correlation between their new system and any increased or decreased reporting by victims of sexual assault. There was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims’ willingness to report crimes. Similarly, we found no studies by our allies that examined the impact of the changes on prosecution rates, conviction rates, or processing times, although generally their cases now take longer. *Transcript of Testimony, RSP Public Meeting at 208-09 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 5 (Sept. 25, 2013).*

2. **LTG Darpino:** Civilian communities do not conduct the same type of focused research on specific populations, but advocacy groups estimate that rapes and sexual assaults are reported at rates that range from 5-46%, depending on the population surveyed. Note that universities and colleges, whose age range is comparable to ours, fall at the lowest end of that scale, with reporting rates estimated in the single digits while the Army's reporting rates are on the high end or above the average reporting in the civilian sector. *Written Testimony to RSP Public Meeting at 12 (Sept. 25, 2013).*
3. **LTG Darpino:** Looking at prosecution rates, the Army again compares favorably. There is no civilian or allied system subject to similar reporting requirements that allows us to make an "apples to apples" comparison. The military is required to report the disposition and punishment, as well as a synopsis of each offense with demographic data, for every unrestricted report of sexual assault. That information is available at <http://www.sapr.mil/index.php/annual-reports>. The data derived from that annual report indicates that when one looks at the penetrative offenses in which the Army had jurisdiction over the offender and a final disposition was made, commanders prosecuted rape at a rate of 56% and sexual assault (sleeping or incapacitated victim) at a rate of 59%. These rates are more than double the estimated average prosecution rates for civilian jurisdictions of 18-22%. We did so while also protecting an accused's right to a fair trial.

This favorable comparison is corroborated by other data found in the Annual Report to Congress. The report requires reporting of the disposition for cases in which a Soldier offender is prosecuted by civilian or foreign authorities. For the offense of rape, of the 68 cases in which a Soldier offender was prosecuted by civilian authorities, the civilian authorities dismissed the charges in 22 cases, prosecuted lesser non-sexual assault charges in 11 cases, prosecuted the sexual assault charges in 7 cases, and had 28 cases still pending. This would correlate to a 17% prosecution rate to the Army 56%. For the offense of sexual assault (sleeping or intoxicated victim), of the 37 cases in which a Soldier offender was prosecuted by civilian authorities, the civilian authorities dismissed the charges in 14 cases, prosecuted lesser non-sexual assault charges in 10 cases, prosecuted the sexual assault charges in 4 cases, and had 10 cases still pending. This would correlate to a 14% prosecution rate to the Army 59%.

Written Testimony to RSP Public Meeting at 14-15 (Sept. 25, 2013).

4. **LTG Darpino:** Our allied forces are a decade behind the U.S. military in measuring and studying reporting rates. What is clear is that any survey data available indicates that our allies have high rates of incident and issues with underreporting. In June 2013, the Australian Minister of Defence stated that initial analysis of the first of its kind gender relations survey concluded that only 20% of sexual assault victims reported the offense. In the United Kingdom, a survey conducted in 2006 found that 70% of female servicemembers experienced unwelcome sexual behavior. Of the 13% who reported experiencing a sexual assault, only 5% chose to report that assault to their command. A 2008 survey conducted on the Israeli Defense Forces found that 1 in 7 female servicemembers reported being sexually harassed. Regardless of the data, one conclusion that all our allies agree upon is that changes in the role of the commander in military justice had no effect on reporting or prosecution of sexual assault offenses. Conversely, I believe the command

emphasis has positive effects on our reporting. *Written Testimony to RSP Public Meeting at ¶ 13 (Sept. 25, 2013).*

V. Objections Based on Commander Accountability and Responsibility

A. 'Commanders must remain accountable'

1. **BG Gross:** Commanders are accountable for all that goes on in a unit. Ultimately, they are responsible for mission success. However, there are proposed changes to the military justice system, such as removal of the commander from the military justice system, that have the potential to truly harm our units, our ability to obtain accountability and respond to the concerns of victims about the process. *Transcript of Testimony, RSP Public Meeting at 205 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 3 (Sept. 25, 2013).*
2. **LTG Darpino:** We must ensure that we have a comprehensive system of checks and balances on all our actors in the system, set requirements that can be objectively evaluated and verified. Commanders must have responsibilities that cannot be delegated to staffs and subordinates. They must be responsible. The responsibilities must be placed on the commander at the center of our system so that it can be measured and judged. *Transcript of Testimony, RSP Public Meeting at 212-13 (Sept. 25, 2013).*
3. **VADM DeRenzi:** The commander is responsible and accountable for everything that happens in his or her ship, squadron, or unit. Commanders are personally responsible for sustaining unit readiness, good order and discipline, and the safety and well-being of Sailors under their charge. Permanent, effective change must be implemented through our commanders. *Written Testimony to RSP Public Meeting at 10 (Sept. 25, 2013).*
4. **Lt Gen Harding:** [W]hen it comes to command climate, there is no substitute for the commander's informed judgment on the particular circumstances and stresses placed upon the service member or on the commander's unit. And importantly, there is also no better person to hold accountable for that climate than the commander. As part of that assessment of accountability for the unit's climate, commanders should be held accountable for failing to appropriately hold their subordinates accountable for the commission of crimes, such as sexual assault. *Transcript of Testimony, RSP Public Meeting at 236-37 (Sept. 25, 2013); Written Testimony to RSP Public Meeting at 2 (unnumbered) (Sept. 25, 2013).*

B. 'Only commanders can effect the cultural change that is required'

1. **RADM Kenney:** The eradication of sexual assault within the Coast Guard requires more than extra lawyers or added legal procedures. It requires a cultural change. Cultural change requires leadership; and leadership in the military is provided by the commander. Only the commander, viewed as the unitary authority of a unit, can set the right tone of rejecting sexist mindsets and prejudices. Only the commander,

often operating in remote locations or on the high seas, can ensure the protection of victims. Only the commander, held ultimately accountable for the unit's successes and failures, has the necessary authority to address the issue of morale, safety, and security of his or her unit. Commanders must be part of the solution. *Written Testimony to RSP Public Meeting at 2 (Sept. 25, 2013).*

2. **LTG Darpino:** While proposed changes to the military justice system are the easiest and most available targets for change, those changes will not get at the root of our problem. It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers. It is commanders' focus, involvement, and emphasis that will bring the change in the culture that we seek.

. . . As with our civilian counterparts, the vast majority of our victims and our offenders – in our case, two-thirds of our cases – involve junior soldiers between the ages of 18 and 24 years old. What makes us different than our civilian counterparts is that the military has a time-honed structure to instill values, to make that culture change. That method is the power of the command. Commanders set priorities, commanders provide vision, and commanders give orders to execute that vision. And when those orders are not followed, commanders are the ones who hold people accountable.

Past progress and institutional change, whether racial or gender integration, or, more recently, Don't Ask, Don't Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assault. In my opinion, command involvement and accountability are the essential elements in solving this problem.

Transcript of Testimony, RSP Public Meeting at 236-37 (Sept. 25, 2013).

3. **RADM Kenney:** It is imperative that the commander have a role in the disciplinary process so that they remain engaged in the fight to eliminate sexual assault and that their subordinates see that commitment. If the commander's role is removed, it will lessen the importance of sex assault prevention in the eyes of the subordinates.

Currently, our commanders are openly and frankly discussing the issues of sexual assault with their subordinates while at the same time backing up that talk by holding those accountable who fail to follow the law. If the ability to hold members accountable is removed, the importance of the prevention message will also be diminished, no matter how much the commanders stress it.

Written Testimony to RSP Public Meeting at 6 (Sept. 25, 2013); see also Transcript of Testimony, RSP Public Meeting at 259-60 (Sept. 25, 2013) (" . . . I am committed to changing our organizational culture. However, I am very concerned that dramatically changing our system of justice at the same time that we are trying to change our culture will impede that cultural change. Any enduring change to our service culture must include the commander and their ability to instill and reinforce that change.").